Supreme Court, U.S.
FILED

No. 09- 091550

JUN 16 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STUART CARSON, HONG CARSON, PAUL COSGROVE, AND DAVID EDMONDS,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

THE UNITED STATES OF AMERICA,

Real Party in Interest

IMI, PLC AND CONTROL COMPONENTS, INC.

Real Parties in Interest

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS H. BIENERT, JR.
KENNETH M. MILLER
BIENERT, MILLER & KATZMAN PLC
115 Avenida Miramar
San Clemente, CA 92672
(949) 369-3700
tbienert@bmkattorneys.com

KIMBERLY A. DUNNE
STEVEN A. ELLIS
ANDREW J. DUNBAR*
SIDLEY AUSTIN LLP
555 W. Fifth Street
40th Floor
Los Angeles, CA 90013
(213) 896-6000
kdunne@sidley.com

Counsel for Petitioners

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

June 16, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

NICOLA T. HANNA
GIBSON, DUNN &
CRUTCHER LLP
3161 Michelson Drive
Suite 1200
Irvine, CA 92612
(949) 451-3800
nhanna@gibsondunn.com

DAVID W. WIECHERT
MICHAEL A. WEINBAUM
107 Avenida Miramar
Suite A
San Clemente, CA 92672
(949) 361-2822
dwiechert@aol.com

QUESTIONS PRESENTED

1. Are the Government's obligations to provide documents to defendants under (a) *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny, and (b) Federal Rule of Criminal Procedure 16, limited to documents that are in the physical possession of the Government, or do those obligations extend to all documents within the Government's "possession, custody, or control," including those documents currently in the physical possession of a cooperating defendant that has signed a plea agreement requiring it to provide the documents to the Government upon request?

2. May a cooperating corporate target of a criminal investigation rely upon the doctrine of "selective waiver" and thereby (a) produce documents and provide information to the Government during the course of its plea negotiations but then (b) object to the Government's production of those same documents and that same information to an individual defendant based on a claim that the materials remain protected by the attorney-client privilege and work product doctrine?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Ninth Circuit were: (a) petitioners Stuart Carson, Hong Carson, Paul Cosgrove, and David Edmonds, all of whom are defendants in the District Court; (b) respondent the United States District Court for the Central District of California; (c) real party in interest the United States of America; and (d) real parties in interest IMI plc and Control Components, Inc., who were intervenors in the District Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL RULES PROVISION	1
STATEMENT OF THE CASE	1
I. BACKGROUND	3
II. PROCEDURAL HISTORY	5
III. THE MOTION TO COMPEL	10
IV. THE LOWER COURT RULINGS	13
REASONS FOR GRANTING THE PETITION	14
I. THE "POSSESSION, CUSTODY, OR CONTROL" STANDARD	15
II. THE SELECTIVE WAIVER DOCTRINE	21
CONCLUSION	25
APPENDIX	1a
Carson v. *U.S. Dist. Court for the Central Dist. Of Ca.*, No. 10-70008 (9th Cir. Mar. 18, 2010) (order denying denying petition for writ of mandamus)	1a
United States v. *Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Dec. 8, 2009) (district opinion and minutes)	2a

TABLE OF AUTHORITIES

CASES Page

Bates v. *United States*, 522 U.S. 23 (1997).. 15
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959) 15
Bowman Dairy Co. v. *United States*, 341 U.S. 214 (1951) 21
Brady v. *Maryland*, 373 U.S. 83 (1963)..... 1, 2
Burden-Meeks v. *Welch*, 319 F.3d 897 (7th Cir. 2003) 22
Corley v. *United States*, 129 S. Ct. 1558 (2009) 16
Dickinson v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950) 14
Diversified Indus., Inc. v. *Meredith*, 572 F.2d 596 (8th Cir. 1977) 24
Estelle v. *Gamble*, 429 U.S. 97 (1976)..... 15
Gillespie v. *U.S. Steel Corp.*, 379 U.S. 148 (1964) 15
In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002) 23
In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) 23
In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179 (10th Cir. 2006) 23
In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993)..... 22, 23
Kyles v. *Whitley*, 514 U.S. 419 (1995)..... 18
Land v. *Dollar*, 330 U.S. 731 (1947)..... 15
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 15
Mac's Shell Serv., Inc. v. *Shell Oil Prods. Co. LLC*, 130 S. Ct. 1251 (2010) 16
Marek v. *Chesny*, 473 U.S. 1 (1985)..... 16

TABLE OF AUTHORITIES—continued

Page

Mazurek v. *Armstrong*, 520 U.S. 968 (1997) 14
Moldowan v. *City of Warren*, 578 F.3d 351 (6th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3567 (U.S. Mar. 19, 2010) 18
Oliver v. *United States*, 466 U.S. 170 (1984) 15
Permian Corp. v. *United States*, 665 F.2d 1214 (D.C. Cir. 1981) 23
Searock v. *Stripling*, 736 F.2d 650 (11th Cir. 1984) 17
Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. *Rogers*, 357 U.S. 197 (1958) 17
Societe Nationale Industrielle Aerospatiale v. *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987) 15
U.S. Int'l Trade Comm'n v. *ASAT, Inc.*, 411 F.3d 245 (D.C. Cir. 2005) 17
United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 15
United States v. *Gil*, 297 F.3d 93 (2d Cir. 2002) 18
United States v. *Kilroy*, 523 F. Supp. 206 (E.D. Wis. 1981) 20
United States v. *MIT*, 129 F.3d 681 (1st Cir. 1997) 22, 23
United States v. *Perdomo*, 929 F.2d 967 (3d Cir. 1991) 18
United States v. *Stein*, 488 F. Supp. 2d 350 (S.D.N.Y. 2007) 16, 19, 20
Westinghouse Elec. Corp. v. *Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991) 23

TABLE OF AUTHORITIES—continued

Page

RULES

Fed. R. Crim. P. 16(a)(1)(E) 1
Fed. R. Crim. P. 52(a)..... 21

SCHOLARLY AUTHORITY

Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 Am. Crim. L. Rev. 1481 (2007)..... 5, 16

OTHER AUTHORITIES

8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2210 (2d ed. 1994) 17
Eugene Gressman, et al., *Supreme Court Practice*, § 4.18 (9th ed. 2007)..... 15

PETITION FOR A WRIT OF CERTIORARI

Stuart Carson, Hong Carson, Paul Cosgrove, and David Edmonds (collectively "Petitioners") respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals is unpublished and reproduced at Petitioner's Appendix ("Pet. App.") 1a. The order of the district court denying Petitioners' motion to compel under *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny and Federal Rule of Criminal Procedure 16 is unpublished and reproduced at Pet. App. 2a-15a.

JURISDICTION

The final order of the court of appeals was entered on March 18, 2010. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES PROVISION

Federal Rule of Criminal Procedure 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its

case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

STATEMENT OF THE CASE

This case presents issues of extraordinary importance to the criminal justice system. There is no dispute that the Government's obligations to turn over documents pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny (collectively, "*Brady*") and Federal Rule of Criminal Procedure 16 ("Rule 16") are absolutely critical to ensuring a fair criminal trial. There is, however, a fundamental dispute that has emerged in recent years between the Government and defendants over the Government's disclosure obligations for documents otherwise subject to *Brady* and Rule 16 that are left by the Government in the physical possession of a third party who (a) has agreed to cooperate with the Government and (b) is legally required to provide the documents to the Government upon request. Although such documents are not in the actual physical "possession" of the Government, they are plainly within the Government's "control," and the lower court ruling to the contrary was clearly erroneous. Moreover, given the fundamental importance of this recurring issue to prosecutors, defendants, and cooperating witnesses, and the conflict in lower court rulings on this issue, a grant of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is appropriate here.

Government prosecutors, defense attorneys, and the lower courts will all benefit from prompt and necessary guidance and clarification from this Court. In recent years, Government prosecutors have increasingly "outsourced" criminal investigations,

relying upon cooperating private parties (usually corporations or other large business entities) to review and analyze – and maintain possession of – large quantities of relevant material. As a result, the issues raised by this Petition are recurring, contemporary, and pressing. In the absence of guidance from this Court, the lower courts will continue to struggle with emerging issues regarding the application of *Brady* and Rule 16 in this context – as well as the accompanying privilege and work product issues that inevitably arise when corporate defendants cooperate with the Government by selectively turning over purportedly privileged material to the Government to aid in the prosecution of their former employees.

I. BACKGROUND

In a traditional investigation, Government agents and prosecutors obtain physical possession of the documents relevant to their investigation through grand jury subpoenas, the voluntary assistance of cooperating parties, or some other investigative mechanism. It is universally understood that the Government has an obligation to make *Brady* and Rule 16 disclosures, at a minimum, from the full set of information that is in its physical possession. With the emergence of the use of email and other electronic data and information by domestic and foreign corporations in the past 15 years, it is not unusual for federal prosecutors to collect hundreds of thousands or even millions of pages of materials during the course of an investigation and to produce much of that data to defendants in the regular course of criminal discovery.

Due to the large-scale financial defalcations of the past decade, prosecution of corporate fraud is one of the Government's top priorities. Because of the

corporate penalty construct set forth in the United States Sentencing Guidelines, as well as guidance provided through a series of memoranda published by the Department of Justice, corporations now frequently make voluntary disclosures to the Government of potential wrongdoing or decide during an investigation to cooperate with the Government in an effort to mitigate their criminal exposure. This trend has enabled the Government to gather evidence in a different manner in recent years. Particularly in investigations of corporate criminality in large and complex business transactions, the following pattern is now frequently observed:

(a) A private business entity will offer to cooperate fully with prosecutors, often in the hope of not being prosecuted, entering into a deferred- or non-prosecution agreement, or receiving a reduced sentence.

(b) The business entity, working with its lawyers and other outside consultants, will conduct a sweep of its electronic and paper records, identifying and gathering literally millions of pages of relevant documents.

(c) The Government will then "outsource" much of the investigatory work to the business entity, requiring the entity to analyze and filter the documents, turn over only a relatively small number of the most important documents, and provide some summary or analysis of the other documents that focuses on the issues most of interest to the prosecutors (often relating to alleged wrongdoing by individual employees or others affiliated with the entity).

(d) The business entity will retain possession of the remaining documents gathered in connection

with the investigation.

(e) The business entity will agree in writing (sometimes as part of a plea agreement) to continue to cooperate with the Government and to provide, upon request, any other documents relating to the subject matter of the investigation or alleged wrongdoing.

See generally Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 Am. Crim. L. Rev. 1481 (2007). That is precisely what happened here.

II. PROCEDURAL HISTORY

In mid 2007, intervenor and real party in interest Control Components, Inc. ("CCI"), a company that sells control valves used in power plants worldwide, along with its parent company IMI plc ("IMI"), made a voluntary disclosure to the Department of Justice after an internal investigation supervised by the law firm of Steptoe & Johnson LLP ("Steptoe"). Thereafter, CCI and IMI agreed to cooperate fully with a Government investigation of potential violations of the Travel Act and Foreign Corrupt Practices Act ("FCPA") arising from their international sales operations. At the request and direction of the Government, CCI and IMI gathered and analyzed a massive amount of electronic and paper material (at their sole expense) and provided the Government – at the Government's request – with summaries of what they discovered, along with a small set of documents that purportedly implicate certain former CCI employees, including the four Petitioners.

During the corporate internal investigation, IMI and CCI specifically directed Steptoe to cooperate

fully with the Government. Ex. 13, at 239-40.[1] Steptoe, working with forensic accountants at Ernst & Young ("EY"), conducted an extensive sweep of CCI's paper and electronic document files. In the Sentencing Memorandum that accompanied its eventual guilty plea, CCI represented that through these efforts, "EY secured all *relevant* evidence from CCI and IMI, including email, accounting records, agency agreements and forensic images of over 200 computer hard drives." Ex. 7, at 87 (emphasis added). EY compiled 5.5 million documents totaling approximately 75 million pages into a "comprehensive, searchable electronic database." Ex. 7, at 87; Ex. 13, at 236-37.

Throughout this process, CCI worked hand-in-hand with the Government, and the Government controlled and directed the activities of CCI, Steptoe, and EY. For example, EY ran searches through the electronic database it created based upon a list of search terms requested by the Government and ultimately agreed to by CCI. Ex. 15, at 303:25–305:12. Further, the Government used CCI as a document collection point, directing at least one witness to turn over relevant documents not to the FBI or Department of Justice personnel but to Steptoe. Ex. 5. In short, the Government asked CCI to serve as its investigative agent and document repository during the course of the investigation, and CCI readily agreed.

The documents in CCI's physical possession include such key items as (a) the project files for each of the projects in which the Government alleges that a corrupt payment was made; (b) documents reflecting

---

[1] References to the record are to the exhibits filed with the mandamus petition in the Ninth Circuit and are denoted as "Ex."

communications between CCI's foreign offices and the alleged recipients of the corrupt payments, including documents relating to the relevant payments themselves and/or to the projects on which the Government alleges the corrupt payments were made; (c) other documents and information on the hard drives of Petitioners' computers; (d) emails to and from each of the Petitioners; and (e) documents formerly in the possession of the Petitioners relating to pertinent policies of CCI. Ex. 10, at 169-70, 185-86.

Also as part of IMI's investigation, Steptoe interviewed approximately 125 IMI and CCI employees in 15 countries and memorialized the substance of those interviews in written memoranda. Ex. 7, at 89. Steptoe then provided oral summaries of a subset of its witness interviews to the Department of Justice.

In October 2007, IMI and the Department of Justice entered into a letter agreement regarding their cooperative efforts (the "Letter Agreement"). Ex. 4. The Letter Agreement stated that (a) IMI would provide to the Government certain information that IMI claimed was protected by the attorney-client privilege or attorney work product doctrine; (b) the Government would not assert that the production of information pursuant to the agreement would constitute a waiver of the attorney-client privilege or work product doctrine "as to any third party"; and (c) the Government would maintain the confidentiality of the information produced pursuant to the agreement "*except to the extent that DOJ determines in its sole discretion that disclosure is otherwise required by law.*" Ex. 4, at 62 (emphasis added).

Pursuant to the Letter Agreement, IMI and CCI produced approximately 37,000 pages of cherry-picked documents to the Government. Ex. 13, at 240. This is less than 0.5 percent of the 75 million pages of potentially relevant documents that CCI gathered in its initial sweep. CCI retained the remaining 99.5 percent of the documents.

During its investigation, the Government also asked CCI to prepare charts and other extensive factual analyses of certain information obtained from the review of the documents and the witness interviews, including a summary of the payments that had been identified as potentially improper. CCI, with the assistance of Steptoe, did so. Ex. 13, at 240-41. In preparing these charts and extensive analyses to give to the Government, CCI stated that it was not waiving its right to assert the attorney-client privilege or the work product doctrine as against third parties. Ex. 13, at 241.

Based in large part upon information that CCI provided, the grand jury issued a 16-count indictment of Petitioners on April 8, 2009. Ex. 3. The indictment alleges that Petitioners made, or directed others at CCI to make, at least 236 corrupt payments to a range of recipients in more than thirty countries – including employees of state-owned companies and privately owned companies – in a total amount of approximately $6.85 million. CCI allegedly obtained net profits of approximately $46.5 million from sales related to those corrupt payments. Ex. 3, at 31-32. The indictment charges Petitioners with violations of the FCPA and other federal statutes.

On July 22, 2009, the Government and CCI signed a Plea Agreement resolving the investigation into the corporate conduct of CCI. Ex. 6. CCI agreed to plead

guilty to three counts of violating the FCPA (one conspiracy count and two substantive FCPA counts), and the Government agreed to recommend that CCI serve three years' probation and pay a fine of $18.5 million – an amount that was (a) less than 40 percent of CCI's net profit on the sales that were allegedly related to the unlawful payments and (b) $9 million less than the minimum fine under the Sentencing Guidelines. Ex. 6 at 72-77.

With respect to IMI, the Government took the unusual step of agreeing, in writing and before conducting a thorough inquiry, to close its investigation, which effectively protected IMI and its officers and employees from any threat of criminal prosecution. Ex. 9. Thus, through their ostensible cooperation with the Government, and their selective production of documents, IMI executives were able to contain this investigation to IMI's subsidiary and insulate the company and themselves from any further investigation and potential criminal liability.

One of the justifications offered by the Government for the downward departure from the otherwise applicable fine amount for CCI was CCI's "voluntary disclosure of evidence obtained as a result of its extensive internal investigation and its substantial cooperation in the Department's investigation and prosecution." Ex. 6, at 74-75. Indeed, the Plea Agreement included a lengthy provision regarding CCI's ongoing obligation to cooperate with the Government in its prosecution efforts:

> CCI agrees to continue to cooperate fully with the Department and the Federal Bureau of Investigation, in a manner consistent with the [Letter Agreement]. . . . CCI shall truthfully disclose to the Department all non-privileged information with respect to the activities of CCI

> and its affiliates, its present and former directors, officers, employees, agents, consultants, contractors and subcontractors, concerning all matters relating to corrupt payments to foreign public officials or to employees of private customers in connection with their operations about which CCI has any knowledge and about which the Department, the Federal Bureau of Investigation, or, at the request of the Department, any foreign law enforcement authorities and agencies, shall inquire. *This obligation of truthful disclosure includes the obligation of CCI to provide to the Department, upon request, any non-privileged document, record, or other tangible evidence relating to such corrupt payments to foreign public officials or to employees of private customers* about which the aforementioned authorities and agencies shall inquire of CCI, subject to the direction of the Department.

Ex. 6, at 68 (emphasis added).

The District Court accepted CCI's guilty plea, entered judgment against CCI, waived preparation of a presentence report, and immediately imposed a sentence consistent with the Plea Agreement and the Government's recommendation. Ex. 8, at 130:24-141:15. In accepting the plea and imposing sentence, the District Court specifically noted and relied upon the fact that CCI had agreed to continue to cooperate with the Government in its ongoing investigation and prosecution. Ex. 8, at 139:18-22.

III. THE MOTION TO COMPEL

Meanwhile, the Petitioners, in the ongoing proceedings against them, requested the immediate production of *Brady* material and also made a proper

Rule 16(a)(1)(E) request for documents from the Government. In response, the Government made a narrow production, claiming that it had no obligation under *Brady* or Rule 16 to review – or to make available for Petitioners to review – any portion of the documents in the possession of CCI, notwithstanding the Government's legal right to request documents from CCI (and CCI's corresponding legal obligation under the Plea Agreement to provide relevant documents to the Government upon request). The Government also took the position that certain documents in its physical possession could not be disclosed to Petitioners because they remained subject to the attorney-client privilege and/or work product doctrine protection of CCI or IMI.

Petitioners filed a joint motion to compel. Ex. 10. As Petitioners pointed out in their moving papers, this was not a theoretical exercise or a "fishing expedition." Petitioners are aware of specific evidence in the possession of CCI and IMI – material that the Government has never produced but that is plainly available to it under the CCI Plea Agreement – that *directly rebuts* allegations against Petitioners. For example, Petitioners learned through media reports that (a) internal investigations by several Chinese companies uncovered *no evidence* that their employees had been bribed by CCI, and (b) the president of IMI China admitted in a letter dated June 22, 2009 to a representative of China National Offshore Oil Corporation ("CNOOC") – one of the foreign companies whose employees, the Government claims, were bribed by CCI (see Ex. 3, at 44-46, 55) – that IMI's internal investigation had *failed to substantiate* the allegations that CCI employees paid money to CNOOC employees.

Despite the clearly exculpatory nature of this letter and the Government's indisputable right to obtain it, the letter has not been produced to Petitioners. Petitioners' motion to compel sought the production of this and other highly relevant material plainly subject to production under *Brady* and Rule 16.

Other obviously key documents that Petitioners sought in their motion to compel included (a) project files for those projects in which the Government alleges corrupt payments were made, (b) emails related to those projects, (c) project documents maintained in foreign offices, and (d) imaged copies of Petitioners' computers. None of this material has been produced by the Government. Ex. 10, at 167-72.

The Government opposed Petitioners' motion to compel. The Government argued that it had produced all the *Brady* material to which the Petitioners are entitled – *i.e.*, all *Brady* material within the Government's physical possession – and that it had no duty under *Brady* or Rule 16 to produce documents that were in the possession of CCI, a private party. The Government recognized that under its approach, there would be no *Brady* review of any of material in CCI's possession: the Government would not conduct a *Brady* review of this material; neither would (or could) CCI. Ex. 15, at 305:4-306:3; see also Ex. 12, at 231:22-23 (statement of CCI's counsel at Steptoe that "[n]ot knowing the government's case, I have no way of knowing what's exculpatory or not").

CCI and IMI sought and were granted leave to intervene for the limited purposes of (a) asserting that some of the material that Petitioners seek remains protected by the attorney-client privilege or the work product doctrine – notwithstanding the fact that CCI shared the material with the Government

and (b) asserting that the Government did not have a contractual right to the control of its documents. Ex. 11.

Although the Government and CCI had only months earlier relied upon the *breadth* of CCI's agreement to cooperate with the Government in the Plea Agreement to justify the request for a reduced sentence, CCI now took the position that (a) its agreement to produce additional documents was limited to those "relating to corrupt payments" and (b) that phrase should be interpreted narrowly to apply only to evidence already produced (that is, the inculpatory evidence that CCI had already given to the Government) – and would not include potentially exculpatory material directly relevant to the events at issue in this prosecution, such as CCI's project files and the Petitioners' emails and computer hard drives. Ex. 15, at 313:20-21, 303:25-305:12.

IV. THE LOWER COURT RULINGS

On November 9, 2009, the District Court entertained a lengthy oral argument on the motion to compel. Prior to the hearing, the District Court provided a tentative ruling stating that, as a matter of law, the Government did not have "possession, custody, or control" of documents in the hands of a private third party. Ex. 14, at 247-51.

On December 8, 2009, the District Court issued an order denying Petitioners' motion to compel. Pet. App. 2a-15a. The Court reiterated its determination, initially set forth in the tentative ruling, that neither *Brady* nor Rule 16 reaches documents outside of the physical possession of the Government. Pet. App. 6a. The District Court also held that CCI's production of documents allegedly protected by the attorney-client privilege and the work product doctrine to an

adversary – the Government – had not resulted in a waiver of the privilege as to Petitioners. Pet. App. 11a-13a.[2]

Petitioners filed a petition for a writ of mandate with the Ninth Circuit. On March 18, 2010, the Ninth Circuit denied that petition. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

Review, or summary reversal, is warranted here because of the importance of the issue to the fairness of criminal proceedings, the divergence of judicial decisions on this issue, and clear errors of the lower courts in this case in (a) misconstruing the "possession, custody, or control" standard and (b) permitting the Government and CCI to invoke the "selective waiver" doctrine. Although Petitioners recognize that the Court generally disfavors review of non-final rulings, *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950), this Court has granted certiorari to review interlocutory rulings in both civil and criminal cases where, as here, the issue is of fundamental importance to the further conduct of the case, the lower court's ruling is clearly erroneous, and the case would otherwise warrant a grant of certiorari. *E.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 975-76 (1997) (per curiam) (reviewing Ninth Circuit's ruling reversing denial of a preliminary

---

[2] The District Court questioned whether Petitioners had met the required materiality standard under Rule 16 "[w]ith respect to many categories," Pet. App. 9a-10a, but did not make specific findings with regard to the materiality of each specific discovery request; instead, the Court denied Petitioners' motion on the ground that the documents Petitioners sought were not within the Government's "control." Likewise, the District Court made no findings as to whether the items sought were favorable to the defense and therefore subject to disclosure under *Brady*.

injunction motion where the appellate court's ruling was "clearly erroneous" and "ha[d] produced immediate consequences" for the State of Montana); *Oliver* v. *United States*, 466 U.S. 170 (1984) (reviewing appellate court ruling reversing order excluding evidence in criminal trial); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 501 (1959) (reviewing Ninth Circuit's denial of mandamus petition challenging trial court order denying plaintiff's request for a jury trial in civil case); see also Eugene Gressman, et al., *Supreme Court Practice*, § 4.18 (9th ed. 2007).[3]

I. THE "POSSESSION, CUSTODY, OR CONTROL" STANDARD

The ruling on the "possession, custody, or control" standard warrants review, or summary reversal, by the Court.

First, this is an issue of fundamental importance to the criminal justice system and to Petitioners relating to defendants' right to a fair trial. As courts and commentators have noted, prosecutors are commonly, and with growing frequency, "outsourcing" the responsibility of document gathering and analysis to cooperating corporate defendants (or their hired

---

[3] *See also, e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (reviewing appellate ruling reversing order dismissing indictment); *Societe Nationale Industrielle Aerospatiale* v. *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 528 (1987) (reviewing appellate court's denial of mandamus petition challenging district court's ruling on a discovery issue in a civil case); *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (reviewing appellate ruling reinstating civil rights complaint dismissed by the district court); *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

consulting firms) in complex criminal investigations. See, *e.g.*, *United States* v. *Stein*, 488 F. Supp. 2d 350, 364 (S.D.N.Y. 2007); Bohrer & Trencher, 44 Am. Crim. L. Rev. at 1496. Without a proper *Brady* and Rule 16 review of the documents that are plainly within the control of prosecutors, the right of Petitioners and other defendants to a fair trial will be severely compromised.

Second, it was fundamental error for the District Court to rule in this case that the Government does not "control" (for purposes of *Brady* and Rule 16) "materials in the possession of a private third party," Pet. App. 6a, even though the private party is under a legal obligation to provide those materials to the Government upon request.

As to Rule 16, the District Court's construction of the phrase "possession, custody, or control" is contrary to the plain meaning of the phrase as it appears in the text of the rule. Three terms are used, and they are used in the disjunctive. Thus, from the structure of Rule 16 itself, it is clear that "possession, custody, or control" must mean *something* more than only current, physical "possession."

In the District Court's ruling, however, the word "control" is reduced to a nullity, mere surplusage with no meaning or significance. That is contrary to settled canons of construction and so is clearly erroneous. See *Marek* v. *Chesny*, 473 U.S. 1, 9 (1985) (adopting "the only construction [of Federal Rule of Civil Procedure 68] that gives meaning to each word"); see also, *e.g.*, *Mac's Shell Serv., Inc.* v. *Shell Oil Prods. Co. LLC*, 130 S. Ct. 1251, 1254 (2010) ("statutes should be construed in a manner that gives effect to all of their provisions") (quotations omitted); *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) ("one of the most basic interpretative canons [is] that

[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant") (internal quotations and citation omitted).

In addition, the District Court's construction is contrary to the settled meaning of the same phrase in other federal rules. Specifically, the phrase "possession, custody, or control" also appears in Rules 34 and 45 of the Federal Rules of Civil Procedure, and the phrase has a well established meaning in those contexts. It includes not only documents in the physical possession of a party but also documents held by others who have a legal obligation to provide them to the party upon request. *E.g.*, *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 204 (1958); *U.S. Int'l Trade Comm'n* v. *ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) ("'Control' is defined as the legal right, authority or ability to obtain documents upon demand."); *Searock* v. *Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) ("Control . . . is defined not only as possession, but as the legal right to obtain the documents requested upon demand.") (internal quotations omitted); 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2210 (2d ed. 1994) (stating that "control" of a document under Rule 34 includes "the legal right to obtain the document").

There is simply no reason to believe that the drafters of the federal rules used the very same phrase – "possession, custody, or control" – in both the civil and criminal rules but intended that phrase to have (a) a broad meaning in the civil rules and, at the same time, (b) a different, much narrower, meaning in the later adopted criminal rules. And yet that is, in effect, what the District Court held.

Likewise, the District Court committed serious error in holding that the Government's *Brady* obligations do not extend to documents outside of the prosecutor's physical possession but within the Government's control. Both this Court and other federal courts have unambiguously stated that *Brady* extends to all evidence that a prosecutor has access to – even if it is not in the prosecutor's physical possession. *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995); *Moldowan* v. *City of Warren*, 578 F.3d 351, 378 (6th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3567 (U.S. Mar. 19, 2010) (No. 09-1149); *United States* v. *Gil*, 297 F.3d 93, 106-07 (2d Cir. 2002); *United States* v. *Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991).[4]

Accordingly, the District Court fundamentally erred when it held that the Government's Rule 16 and *Brady* obligations extend only to information within its possession. And as a direct consequence of that error, there will be absolutely no review – under either *Brady* or Rule 16 – in this case, and many others like this one, of documents that are clearly within the Government's control.

Third, the lower court decisions on this issue have been in conflict. In this case, the District Court

---

[4] Although in these cases the information was in the possession of another government agency involved in the investigation, there is no reason to believe that a different rule would apply if the prosecutor's office hired private detectives – rather than the FBI – to investigate alleged criminal activity. When exculpatory evidence is available to prosecutors, the protections of *Brady* are far too important to turn on the happenstance of whether the evidence is currently in the physical possession of an employee of the U.S. Government or a person employed by a private company acting at the behest of the Government.

accepted the Government's argument that it did not "control" documents that were not in its possession. In other cases, however, the lower courts have rejected the same argument.

For example, in *United States* v. *Stein*, certain former partners in the accounting firm KPMG were criminally prosecuted after the firm entered into a Deferred Prosecution Agreement with the Government that required KPMG to produce to the Government documents related to the prosecution upon request. 488 F. Supp. 2d at 352. When the individual partners sought documents from the Government under Rule 16 that were in the physical possession of KPMG, the Government and KPMG objected, arguing that they were not within the Government's "possession, custody, or control." *Id.* at 356.

The *Stein* court rejected these arguments, holding that the documents were within the "control" of the Government even though they were not in its physical possession. *Id.* at 363. As the court explained:

> KPMG's arguments would read the words "custody or control" out of the rule in flat contravention of the principle that all words in a statute, rule or contract are to be given meaning whenever possible. It therefore is not surprising that every circuit to have considered the question has held that "control" under the federal rules of procedure includes the legal right to obtain the documents in question.

Id. "Once control is established," the court held, "the obligation [to produce under Rule 16] exists." *Id.*

The court in *Stein* also rejected the argument that its ruling would somehow impose an unfair burden on the Government:

> The plain language of Rule 16 makes clear that documents material to the defense that are within the government's control are producible. That the government has begun making broad use of [cooperation] agreements of this sort only in comparatively recent years or that it might regard compliance with the rule in such cases to be inconvenient warrants no different conclusion. If [the government] is uncomfortable with the consequences of such provisions, it need not insist upon them in future cases.

Id. at 364.

The only other district court that has considered this issue in a reported decision has come to the same conclusion. See *United States* v. *Kilroy*, 523 F. Supp. 206, 215 (E.D. Wis. 1981) (holding that documents in the possession of the defendant's former employer were within the Government's "control" under Rule 16 because the employer was cooperating with the Government).

Moreover, because of the immediate, fundamental, and recurring nature of this issue, and because there is already a conflict among the lower courts, the Court should not defer considering this issue until after a traditional circuit split develops. Although it is true, in a formal sense, that the denial of discovery in a criminal case can be challenged on appeal from a judgment of conviction, as a practical matter the interests of defendants in obtaining documents that contain relevant and exculpatory information will be damaged in a way that often cannot be remedied in a post-trial appeal. To obtain relief in an appeal after

conviction, defendants must show that they were prejudiced at trial by the District Court's error in failing to order the Government to produce a particular document or set of documents. See Fed. R. Crim. P. 52(a). In many cases, however, this puts the defendants right back in the classic "Catch-22" situation that *Brady* and Rule 16 are designed, in part, to avoid: without access to the documents that were never produced to them, it is always difficult – and sometimes impossible – for defendants to show on appeal that they were adversely affected by the failure to disclose to them documents that they have never seen.[5]

As a result, the appellate courts will have the opportunity to review this issue only rarely. But because of the fundamental and immediate importance of the issue to defendants, and its close relationship to the right of defendants to receive fair trials, it is appropriate for this Court to resolve the issue now, rather than waiting until an indeterminate time in the future for a circuit split to develop.

---

[5] Similarly, the harm to Petitioners cannot be remedied through the issuance of a subpoena to CCI under Federal Rule of Criminal Procedure 17. A Rule 17 subpoena is a means to obtain specifically designated, known items in the possession of a third party, but it is no substitute for the broad obligation of the Government to review all the documents within its possession, custody, or control for disclosure of exculpatory information under *Brady* and material information under Rule 16. *Brady* and Rule 16 requests are constitutional and rule-based criminal discovery devices. In contrast, Rule 17 "was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220 (1951).

II. THE SELECTIVE WAIVER DOCTRINE

The ruling on the selective waiver doctrine also warrants review by the Court.

As part of CCI's ongoing cooperation with the Government, the Government asked CCI to prepare certain factual summaries and analyses. Ex. 7, at 90. CCI's attorneys prepared these documents and shared them with the Government. *Id.* Because these documents were provided to the Government, any attorney-client privilege or work product protection that ever attached to these documents was waived. It is textbook law that disclosure (including, in the case of work product, disclosure to an adversary) waives the protections of both the attorney-client privilege and the work product doctrine. *E.g.*, *Burden-Meeks* v. *Welch*, 319 F.3d 897, 899 (7th Cir. 2003); *United States* v. *MIT*, 129 F.3d 681, 684 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993).

The District Court, however, accepted CCI's invocation of the so-called "selective waiver" doctrine – which (where it is recognized) allows a party to waive the protections of the attorney-client privilege and work product doctrine as to some entities (usually the Government) but then later to decide to assert the attorney-client and work product protections to preclude disclosure to others. Pet. App. 11a-12a.

This is an issue on which there is already a mature circuit split. Most circuits that have addressed this issue, including the First, Second, Third, Fourth, Sixth, Tenth, and D.C. Circuits, have rejected the concept of selective waiver. As these courts have recognized, it is fundamentally unfair (and entirely inconsistent with the theoretical underpinnings of the

attorney-client privilege and work product doctrine) to allow a criminal defendant to waive the attorney-client and work product protections by making a disclosure of information to the Government, obtain a substantial benefit from the disclosure (whether in the form of a deferred prosecution agreement, a lighter sentence, or anything else), and then later resurrect the privilege against other defendants involved in the same or related proceedings. In one of the earliest decisions rejecting selective waiver, the D.C. Circuit explained:

> [A] client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.

Permian Corp. v. *United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981); accord *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 307 (6th Cir. 2002) (stating that once the protections of the attorney-client privilege and work product doctrine are waived, "waiver is complete and final").[6]

The Eighth Circuit, however, permits selective waiver. As that court has concluded, a disclosure of otherwise privileged material by a corporation to the SEC in a "nonpublic . . . investigation" does not preclude the corporation from asserting the privilege

---

[6] *See also, e.g.*, *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1201 (10th Cir. 2006); *MIT*, 129 F.3d at 686; *In re Steinhardt Partners, L.P.* 9 F.3d at 236; *Westinghouse Elec. Corp.* v. *Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623–24 (4th Cir. 1988).

in other proceedings. *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc). "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Id.*

In light of this acknowledged circuit split on this important and recurring issue, the selective waiver issue is now ripe for resolution by this Court and warrants review.

* * *

By both (a) permitting the Government to avoid its obligations under *Brady* and Rule 16, and then (b) allowing CCI to rely upon the doctrine of selective waiver, the lower courts in this case have created dramatic new exceptions to the Government's discovery obligations. Under the lower courts' rulings, by the simple device of "outsourcing" – shifting the burden of maintaining and identifying relevant documents from law enforcement officials to a cooperating private party – the Government can frustrate the application of criminal discovery rules that have been established to help ensure that defendants receive fair criminal trials. In order to preserve the principles established by *Brady* and Rule 16, and to protect the right of defendants to fair trials, this Court therefore should grant review and reverse the rulings of the lower courts in this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS H. BIENERT, JR.
KENNETH M. MILLER
BIENERT, MILLER & KATZMAN PLC
115 Avenida Miramar
San Clemente, CA 92672
(949) 369-3700
tbienert@bmkattorneys.com

KIMBERLY A. DUNNE
STEVEN A. ELLIS
ANDREW J. DUNBAR*
SIDLEY AUSTIN LLP
555 W. Fifth Street
40th Floor
Los Angeles, CA 90013
(213) 896-6000
kdunne@sidley.com

NICOLA T. HANNA
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Suite 1200
Irvine, CA 92612
(949) 451-3800
nhanna@gibsondunn.com

DAVID W. WIECHERT
MICHAEL A. WEINBAUM
107 Avenida Miramar
Suite A
San Clemente, CA 92672
(949) 361-2822
dwiechert@aol.com

Counsel for Petitioners

* Counsel of Record

June 16, 2010

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed MAR 18 2010]

No. 10-70008
D.C. No. 8:09-cr-00077-JVS
Central District of California, Santa Ana

In re: STUART CARSON; PAUL COSGROVE;
DAVID EDMONDS; HONG CARSON.

STUART CARSON; *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA (SANTA ANA),
Respondent,

UNITED STATES OF AMERICA; *et al.*,
Real Parties in Interest.

ORDER

Before: SCHROEDER, PREGERSON and LEAVY, Circuit Judges.

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed: 12/08/2009]

CRIMINAL MINUTES—GENERAL

Case No. SACR 09-0077 JVS Date December 8, 2009

Present: The Honorable James V. Selna

Interpreter Not Needed

Karla J. Tunis	Not Present	Not Present
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond
1. Stuart Carson			X
2. Hong Carson			X
3. Paul Cosgrove			X
4. David Edmonds			X

Attorneys for Defendants	Present	App.	Ret.
1. Nicole T. Hanna			X
2. Kimberly A. Dunne			X
3. Kenneth Miller			X
4. David W. Weichert			X

(In Chambers)

Proceedings: Order Granting in Part and Denying in Part Defendants' Motion to Compel

Defendants Stuart Carson *et al.* (collectively "Carson" or "defendants") move pursuant to Rule 16 of the Federal Rules of Criminal Procedure to compel the

Government to produce 16 categories of documents, the bulk of which are not in the possession of the Government but rather Control Components, Inc. ("CCI") and its corporate parent IMI plc ("IMI"). In large measure, the Motion turns on the theory that the Government has constructive custody and control over the CCI materials sought. For that reason, the Court deals with that theory first and then turns to other aspects of the Motion.[1]

Both the Government and CCI oppose the Motion.[2]

I. The Scope of the Government's Custody and Control.

A. Background.

The present Indictment charges Carson with violations of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2, and the Travel Act ("TA"), 18 U.S.C. § 1952. A separate but parallel prosecution was brought against Carson's employer, CCI. *United States v. Control Components, Inc.*, Case No. SACR 09-162 ("*CCI Case*"). CCI ultimately entered into a Plea Agreement and pled guilty to the charges. (*CCI Case*, Docket Nos. 7, 22.) CCI was fined $18.2 million and placed on corporate probation. (*Id.*, Docket No. 23.)

Prior to the prosecution, CCI had conducted an extensive internal investigation. The investigation was led by outside counsel Steptoe & Johnson LLP ("Steptoe") with the assistance of forensic accountants

---

[1] Unless germane to the issue discussed, the Court simply refers to CCI and does not distinguish between the corporate third parties in this order.

[2] The Court granted CCI and IMI the right to intervene on this Motion on a limited basis to the extent CCI's rights under Plea Agreement, including claims of privilege, are affected. (Docket No. 115.)

from Ernst & Young ("E & Y"). (Heberling Decl., ¶¶ 6-8.) The investigation resulted in the capture of documents and databases throughout the corporations' world-wide operations which were then organized into a searchable database by E & Y. (*Id.*)

The volume of material captured is 5.6 million documents, equating to 75 million pages. Significantly, Steptoe made no effort to conduct a document-by-document review, but used the E & Y database to gather relevant materials. (*Id.*, ¶¶ 13-14.) Similarly, no effort was made to identify each privileged document in the captured materials. (*Id.*, ¶ 15.) The captured materials include attorney-client and work product materials, including the files on IMI's general counsel and in-house attorneys. (*Id.*)

As part of conducting interviews with CCI personnel, Steptoe used the database to compile relevant documents, and created interview binders. (*Id.*, ¶ 13.) The interviews were conducted on behalf of the corporations, and interviewees were so informed through so-called "*Upjohn* warnings."[3] (*Id.*, ¶ 10.) The results of the interviews were memorialized in the form of the work product of Steptoe attorneys. (*Id.*, ¶ 11.)

The Plea Agreement is essentially a contract between CCI and the Government. Among other things, CCI agreed to:

> • "continue to cooperate fully with the Department [of Justice] and the Federal Bureau of Investigation, in a manner consistent with the non-waiver agreement between the parties." (Plea Agreement, ¶ 6.)

---

[3] *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

- "disclose to the Department all non-privileged information with respect to the activities of CCI and its affiliates . . . concerning all matters relating to corrupt payments to foreign official or to employees of private customers . . . and about which the Department, or the Federal Bureau of Investigation . . . shall inquire." (*Id.*)

- "provide to the Department, upon request, any non-privileged document, record or other tangible evidence relating to such corrupt payments." (*Id.*)

B. Carson's Request for CCI Documents.

Although Carson has some more specific requests, the first request is sweeping: for "Control Component Inc.'s ("CCI") Electronic Database collected during its internal investigation." (Motion, p. 2.) Other requests include "Documents relating to the 2007-2008 investigation into commission payments conducted on behalf of CCI," "Documents relating to any investigations, audits or inquiries conducted by IMI/CCI into allegations of wrongdoing by Defendants," and "Documents relating to the 2004 audit of commission payments conducted on behalf of IMI and/or CCI." (*Id.*)

C. The Theory of Constructive Custody.

By virtue of the CCI Plea Agreement, Carson argues that documents within the possession of CCI fall within the scope of required production under Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure. (Memorandum, p. 6.) In relevant part, the Rule provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data,

photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(Fed. R. Crim. P. 16(a)(1)(E); emphasis supplied.) The Court rejects the contention that under Rule 16 the Government's obligation extends to materials in the possession of a private third party.

1. Carson as Third-Party Beneficiary.

While the argument is somewhat formalistic, the Government contends that Carson is not a third-party beneficiary of the Plea Agreement. It is plain that usual contract principles govern interpretation of a plea agreement. *United States v. Given*, 164 F.3d 389, 395-96 (7th Cir. 1999). In deciding whether third parties were beneficiaries to an immunity agreement, the Seventh Circuit in *United States v. Andreas*, 216 F.3d 645, 663 (7th Cir. 2000), looked to the intent of the parties and the circumstances of the agreement in concluding that no third-party rights existed. There is nothing in Plea Agreement to suggest that either the Government or CCI intended expressly or otherwise to create rights in Carson. Indeed, the obligations of CCI are carefully circumscribed.

Carson argues that there exists an obligation to produce documents in CCI's possession without regard to creation of any third-party beneficiary

relationship under the Plea Agreement.[4] (Reply, pp. 15-16.) With this the Court agrees—*if* there is an independent basis for the production of documents in CCI's possession. However, as noted below, the Court finds none.

2. Possession.

Generally, the trigger for an obligation to produce under Rule 16(a)(1)(E) is actual possession. In *United States v. Fort*, 472 F.3d 1106, 1118 (9th Cir. 2007), the requested materials were in the hands of a state agency which was not part of the Government's investigation. The Ninth Circuit described its case law:

> We held that the evidence became discoverable only when the state authorities placed it in the hands of the federal authorities, because "the triggering requirement under rule 16[(a)(1)(E)] is that the papers, documents, and tangible objects be in the actual possession, custody or control of the government."

(*Id.*) There is no dispute that the Government has physical possession of only those materials which CCI had produced to it, which is only a small subset of the 75 million pages in the CCI Electronic Database. The Government points out that it has produced substantially all of those documents. (Government Opposition, pp. 1, 5.)

The fact that the concept of possession extends to federal agencies participating in the Government's investigation is of no benefit to Carson. *United States*

---

[4] Certainly, no third-party beneficiary relationship would be required to compel production of materials in the hands of a federal investigating agency working with the Department of Justice. *See* discussion in text, Section I.C.2.

v. Santiago, 46 F.3d 885, 893-68 (9th Cir.1995); *United States v. Bryan*, 886 F.2d 1032, 1036 (9th Cir. 1989). Whatever its obligations under the Plea Agreement, CCI is not a federal agency and is not part of the investigation.[5]

At the end of the day, Carson's argument rests on the district court decision in *United States v. Stein*, 488 Supp. 2d 350 (S.D. N.Y. 2007). There are many reasons not to follow *Stein*'s lead. First, the terms of the Deferred Prosecution Agreement executed by KPMG in *Stein* were sweeping and open ended:

> 8. KPMG agrees that its continuing cooperation with the Office's investigation shall include, but not be limited to, the following:
>
> (a). Completely and truthfully disclosing all information in its possession to the Office and the IRS about which the Office and the IRS may inquire, including but not limited to all information about activities of KPMG, present and former partners, employees, and agents of KPMG . . .[6]

(*Id.* at 353; emphasis supplied; internal quotation marks deleted.) By no stretch of the imagination did CCI enter into an agreement allowing the Government

---

[5] As the Government points out (Government. Opposition, p. 17), parallel inspection obligations under Rule 16(a)(1)(E) cannot be stretched to third parties. *United States v. Armstrong*, 621 F.2d 951, 954 (9th Cir. 1980). This reinforces the notion that Rule 16 concerns the Government, not third parties.

[6] KMPG's obligations went beyond simply producing information. For example, it agreed to "[a]ssembling, organizing, and providing, in responsive and prompt fashion, and, upon request, expedited fashion, all documents, records, information, and other evidence in KPMG's possession, custody, or control as may be requested by the Office or the IRS." 488 F. Supp. 2d at 353; internal quotation marks deleted.

to request anything in the possession of CCI. The KPMG agreement is devoid of the subject matter and comprehensive privilege strictures for which CCI bargained.[7] (Plea Agreement, ¶¶ 6.) Even if *Stein* were taken at face value, it would not justify the blanket production of much of what Carson requests, including most specifically CCI's Electronic Database.[8]

The tenor of *Stein* is inconsistent with Ninth Circuit's delineation of the Government's obligations under Rule 16 and Rule 16 case law in general. Most of *Stein*'s legal analysis of the concept of constructive custody hinges on private parent/subsidiary and like relationships. *Stein* 488 F. Supp. 2d at 361 & nn. 45, 46. The two district court criminal decisions which *Stein* cites provide modest support. (*Id.* at 362 & nn. 50, 52.) *United States v. Kilroy*, 523 F. Supp. 206 (E.D. Wis. 1981), involved an agreement just as broad as the KPMG agreement, and *United States v. Skeddle*, 176 F.R.D. 258, 261-62 (N.D. Ohio), required to the Government of recapture and produce documents which it once had but returned.[9]

3. Materiality.

With respect to many categories, Carson fails to make the required materiality showing under Rule 16.

---

[7] However, there were some limitations on privileged material. *Stein*, 488 F. Supp. 2d at 353-54.

[8] As discussed below, the CCI Electronic Database would appear to subject to a well-founded claim of attorney work product. *See* text, Section II.A.

[9] The Government's citation of *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006), is somewhat helpful. (Government Opposition, pp. 17-18.) There the District of Columbia Circuit held that the Government was not required to seek documents in Costa Rica under the applicable treaty. (*Id.* at 444.)

"Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense." *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990). Material evidence is evidence that will act as a shield to the Government's case which is a narrow focus. *United States v. Armstrong*, 517 U.S. 465, 462 (1996).[10]

Requests such as the blanket request for the CCI Electronic Database or documents relating generally to unspecified "allegations of wrongdoing by Defendants" simply lack the threshold showing which Rule 16 requires.

As both the Government and CCI point out (Government Opposition, pp. 8, 24; CCI Opposition, p. 14), to the extent that Carson can identify material evidence with relative particularity, his remedy is by way of a subpoena under Rule 17 directed to CCI.

---

[10] "[W]e conclude that in the context of Rule 16 'the defendant's defense' means the defendant's response to the Government's case in chief. While it might be argued that as a general matter, the concept of a 'defense' includes any claim that is a 'sword,' challenging the prosecution's conduct of the case, the term may encompass only the narrower class of 'shield' claims, which refute the Government's arguments that the defendant committed the crime charged. Rule 16(a)(1)(C) tends to support the 'shield-only' reading. If 'defense' means an argument in response to the prosecution's case in chief, there is a perceptible symmetry between documents 'material to the preparation of the defendant's defense,' and, in the very next phrase, documents 'intended for use by the government as evidence in chief at the trial.'" *United States v. Armstrong*, 517 U.S. at 462.

II. Other Production Requests.

A number of requested items do not hinge on Carson's expanded theory of custody and control. The Court takes these items up in turn.

A. CCI's Privileged Documents.

The Government leaves to CCI response to Carson's request for any privileged material in the possession of the Government. (Government Opposition, p. 23.) CCI represents that the only privileged materials in the possession of the Government are four charts which Steptoe created and provided to the Government. (CCI Opposition, p. 1.) The essence of one of those is reflected in the Government's response to the Court's grant of bill of particulars. (*See* Section II.E, *below*.) The remaining charts dealing with improper gifts, entertainment, and travel expenses; improper expenses for "training trips"; and a chart of CCI's revenues and profits were prepared in a recognized manner to preserve work product. (Heberling Decl., ¶¶ 23-24.) Given the representation that the documents from which the charts were produced were delivered to the Government and produced to Carson (CCI Opposition, pp. 14-15; Heberling Decl., ¶¶ 22-23), the Court finds no good cause to set aside the work product privilege. *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004) ("documents may only be ordered produced upon an adverse party's demonstration of 'substantial need [for] the materials' and 'undue hardship [in obtaining] the substantial equivalent of the materials by other means'").

To the extent that CCI produced privileged materials, it preserved their confidentiality by way of a Confidentiality and Non-Waiver Agreement between IMI and the Government. (Heberling Decl., ¶ 18 &

Ex. A.) The Government acknowledges the Confidentiality and Non-Waive Agreement and its limitation in the Plea Agreement. (Plea Agreement, ¶ 6.) There is ample authority for respecting this type of an agreement. (*See* CCI Opposition, pp. 18-19 and cases summarized there.)

Carson relies heavily on the district court decision in *United States v. Bergonzi*, 216 F.R.D. 487, 493-96 (N.D. Cal. 2003). In contrast to *Bergonzi*, the Confidentiality and Non-Waiver Agreement and Plea Agreement here do not vest in the Government entities the type of discretion to disclose which the *Bergonzi* court found vitiated any expectation of confidentiality. Carson accurately pointed out in oral argument that both here and in *Bergonzi*, the Government could disclose confidential information "to the extent that DOJ determines in its sole discretion that disclosure is otherwise required by law." *Compare* Heberling Decl., Ex. A, p. 2 *with Bergonzi*, 216 F.R.D. at 494. But the agreements with the SEC and the DOJ in *Bergonzi* went much further:

> Specifically, the Company authorized the SEC to, in its discretion, "determine that disclosure is otherwise required by federal law or in furtherance of [either entities] discharge of its duties and responsibilities." SEC Agreement at 2. Likewise, the Company "consent[ed] to the disclosure of the [documents] to a federal grand jury as the [USAO] deems appropriate, and in any criminal prosecution that may result from the [USAO's] investigation."

Bergonzi, 216 F.R.D. at 494 (bracketed material in original). The tenor of the CCI Confidentiality and Non-Waiver Agreement is to maintain confidentiality except "as required by law." Unlike the situation in

Bergonzi, this Court *is* "persuaded that the Company intended the communications to remain confidential." (*Id.*)

To the extent that the present Motion seeks privileged materials in CCI's possession, the Court notes the strong showing which CCI has made with respect to attorney-client and work product materials. (Heberling Decl., ¶¶ 10-12, 18-20.) However, the Court also finds that any privilege challenge to documents in CCI's possession is better addressed in the context of enforcing a subpoena to CCI or IMI which has met the requirements of Rule 17 of the Federal Rules of Criminal Procedure.

B. Pages Missing from Government Production.

Carson contends that the Government has not produced some of the 37,000 pages which CCI produced to the Government. The Government adequately explains that there was an error in CCI's page count in its Sentencing Memorandum. (Government Opposition, p. 5 n. 2.) It represents that all materials have been produced including an additional 2,000 pages. (*Id.*)

C. Communications with the Government.

Carson seeks documents reflecting communications between CCI and IMI and the federal agencies involved in this investigation. The Government acknowledges that it is required to produce such documents to the extent that they constitute *Brady* or *Giglio* materials, and as noted in the next section, represents that is has complied with these obligations.

The Court finds that Carson has not made a sufficient showing of materiality to support blanket production. Courts have noted the minimal eviden-

tiary value of drafts, *United States v. Shanahan*, 252 F.R.D. 536, 542 (E.D. Mo. 2008) ("As a general rule, requests for 'any and all documents' are emblematic of a discovery request or of a fishing expedition.").

D. *Brady* and *Giglio* Materials.

Carson seeks all *Brady* and *Materials* which have not been produced. Putting aside documents in CCI's possession, the Government represents that it has produced all such material. (Government Opposition, p. 6.)

E. Supplemental Bill of Particulars.

The Government sought to satisfy its obligation to provide a bill of particulars concerning the 236 alleged bribes by providing Carson a chart which Steptoe had prepared and provided to the Government. (Government Opposition, p. 7 & Ex. 1.) In it May 18, 2009 Order, the Court directed to the Government to furnish the following specifics:

- The date of the payment.
- The amount of the payment.
- The name of the recipient and business affiliation of the recipient, or if the recipient is an intermediary, the business affiliation of the individual who was intended to benefit from the payment.

(Docket No. 75, pp. 3-4.) While the Government may have provided more than ordered by the Court with its end notes and other explanations (Government Opposition, p. 7), it also provided less. In many instance the year but not the date the payment is provided. (*E.g.*, Government Opposition, Ex. 1, line 1.) In a number of instances, recipients of the payments are identified only as "FIC's"—presumably "friends in

court"—of a particular entity. (*E.g., id.*, Ex. 1, line 28 ("Fujian Pacific FIC(s)").) The absence of detail is particularly troubling where a payment relates to a specific count in the Indictment. (*E.g., id.*, Ex. 1, lines 28, 79, 80, 94, 160, 221.)

Within 20 days, the Government shall supplement the chart with the particulars ordered by the Court. Where it cannot do so after a good faith effort, it shall file a declaration to that effect.

F. Statements of Non-Testifying Co-Conspirators.

Acknowledging that statements of testifying co-conspirators would be governed by the Jencks Act and its separate timetable for production (Memorandum, p. 42), Carson seeks now the statements of non-testifying co-conspirators made during the course of the conspiracy. The courts have recognized that this is a proper subject for Rule 16 production. *United States v. Payden*, 613 F. Supp. 800, 820 (S.D. N.Y. 1983); *United States v. DeFabritus*, 605 F.Supp. 1538, 1548 (S.D.N.Y.1985); *United States v. Turkish*, 458 F.Supp. 874, 882 (S.D.N.Y.1978), *affd*, 623 F.2d 769 (2d Cir.1980).

The Government makes no response to this request, and the Court orders production within twenty days.

G. Preservation of Agent/Investigator's Notes.

Carson asks for an order directing that the Government preserve for trial the notes of any agent or investigator. The Court so orders. *United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976).

Initials of Deputy Clerk: _____